

Assembly Bill No. 21

Passed the Assembly July 23, 2009

Chief Clerk of the Assembly

Passed the Senate July 23, 2009

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2009, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Sections 10115.2, 10115.15, 10430, 10472, and 12112 of the Public Contract Code, relating to state contracts, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 21, Evans. State contracts.

(1) Existing law, with regard to certain state contracts, requires the awarding department to award the contract to the lowest responsible bidder meeting or making a good faith effort to meet specified statewide participation goals for disabled veteran business enterprises. Existing law requires that, if a bidder cites an approved utilization plan in response to the disabled veteran business enterprise participation requirements of a solicitation that calls for specified business participation, and the solicitation specifies higher participation goals than the utilization plan, the bidder shall meet the goals in the solicitation or make a good faith effort to do so.

This bill would instead require the awarding department to award the contract to the lowest responsible bidder meeting specified business enterprise statewide participation goals. The bill would also, if a solicitation specifies higher participation goals than the bidder's utilization plan, require the bidder to meet the goals in the solicitation.

Existing law requires that certain contracts awarded by the Director of Corrections or the Director of the Youth Authority have specified statewide participation goals for minority business enterprises, women business enterprises, and disabled veteran enterprises. Existing law requires the awarding department, in awarding these contracts to the lowest responsible bidder, to consider the responsiveness of a bidder to the goals and, if a bidder fails to demonstrate a good faith effort in attaining these goals, requires the awarding department to award the contract to the next lowest responsive and responsible bidder.

This bill would delete the requirement that, if a bidder fails to demonstrate a good faith effort in attaining these goals, the awarding department must award the contract to the next lowest responsive and responsible bidder.

This bill would require that the state agencies report to the Department of General Services on or before July 1, 2012, and that the department report to the Legislature on or before January 1, 2013, on the impact of the above provisions upon outreach efforts and the actual award of contracts to bidders meeting the business enterprise goals.

(2) Existing law, with specified exceptions, prohibits any person, firm, or subsidiary thereof who has been awarded a consulting services contract from submitting a bid for, or being awarded a contract for, the provision of services, procurement of goods or supplies, or any other related action that is required, suggested, or otherwise deemed appropriate in the end product of the consulting services contract. Existing law provides that this prohibition does not apply to incidental advice or suggestions made outside of the scope of a consulting services contract with regard to certain contracts for the acquisition of information technology goods and services, as specified.

This bill would also exempt from this authorization a contract that is part of a single competitive procurement conducted in more than one stage for information technology goods or services, when the Director of the Department of General Services and the Chief Information Officer determine that there is no conflict of interest, as specified, and that it is in the best interest of the state to utilize this procurement method. The bill would require the department to annually post a report on its Internet Web site describing each determination, as specified, and to provide notice to the Joint Legislative Budget Committee within 30 days of the posting of the report.

(3) Existing law requires the Department of General Services, for any contract for information technology goods or services meeting specified requirements, to provide that not less than 10% of the contract price is required to be withheld until final delivery and acceptance of the goods and services, and requires the department to conduct a risk evaluation, as specified.

This bill would, until July 1, 2013, require the department, if it determines that lesser withholding levels are appropriate based on the evaluation of risk, to withhold no less than 5% of the contract price, if the contract price is \$10,000,000 or more, or no less than 3% of the contract price, if the contract price is less than

\$10,000,000, until final delivery and acceptance of the goods or services.

(4) The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. The Governor issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on July 1, 2009.

This bill would state that it addresses the fiscal emergency declared by the Governor by proclamation issued on July 1, 2009, pursuant to the California Constitution.

(5) This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 10115.2 of the Public Contract Code is amended to read:

10115.2. In awarding contracts to the lowest responsible bidder, the awarding department shall consider the efforts of a bidder to meet minority business enterprise, women business enterprise, and disabled veteran business enterprise goals set forth in this article. The awarding department shall award the contract to the lowest responsible bidder meeting these goals.

SEC. 2. Section 10115.15 of the Public Contract Code is amended to read:

10115.15. (a) Notwithstanding Section 10115.2, when awarding contracts for materials, supplies, or equipment, including electronic data processing goods and services, an awarding department shall accept the submission by a bidder of a minority, women, and disabled veteran business enterprise utilization plan that has been approved prior to the solicitation due date by the Department of General Services. A business utilization plan shall be considered approved by the Department of General Services as of the date submitted to the department so long as the plan meets the minimum criteria established in paragraphs (1) to (12), inclusive, and shall be valid for a period of one year, unless the department has audited the utilization plan, as authorized under subdivision (b), and disapproves it for reasons specified under subdivision (c). The decision of whether to establish a minority, women, and disabled veteran business enterprise utilization plan

shall be at the option of the vendor. If a bidder cites an approved utilization plan in response to the minority, women, and disabled veteran business enterprise participation requirements of a solicitation that calls for 15 percent minority-owned, 5 percent women-owned, and 3 percent disabled veteran-owned business participation, then that utilization plan shall be considered responsive to the participation goals of the solicitation document. If a solicitation specifies higher participation goals than those in the bidder's utilization plan, the bidder shall meet the goals in the solicitation. At a minimum, the utilization plan shall include the following information:

(1) A statement of the vendor's minority, women, and disabled veteran business enterprise utilization plan, including the primary objectives of the utilization plan.

(2) An explanation showing sufficient business reasons why the vendor did not meet minority, women, and disabled veteran business enterprise participation goals set forth in the vendor's minority, women, and disabled veteran business utilization plan submitted to, and approved by, the Department of General Services in the previous year, if applicable. Further, if the vendor did not meet the minority, women, and disabled veteran business participation goals in the previous year, the vendor shall also identify remedial steps it will take to meet the goals in the current utilization plan.

(3) A statement of the vendor's minority, women, and disabled veteran business utilization goals for the succeeding year. At a minimum, these utilization goals shall be equal to the statewide participation goals set forth in subdivision (c) of Section 10115.

(4) Estimated total dollars to be subcontracted by the vendor for sales within the United States for the succeeding year.

(5) Estimated total dollars to be subcontracted by the vendor for sales within the State of California for the succeeding year.

(6) Total dollars expressed as a percentage of the amount estimated pursuant to paragraph (4), intended to be subcontracted with each of the following:

(A) Minority business enterprises.

(B) Women business enterprises.

(7) Total dollars, expressed as a percentage of the amount estimated pursuant to paragraph (5), intended to be subcontracted with disabled veteran-owned business enterprises.

(8) A representative listing of the products and services that the vendor anticipates subcontracting, including an identification of the types of subcontracting planned for minority, women, and disabled veteran business enterprises.

(9) The name of the individual employed by the vendor who will administer the vendor's utilization plan, including a description of the duties of the individual.

(10) A description of the efforts that the vendor will undertake to ensure that minority, women, and disabled veteran business enterprises will have an equitable opportunity to compete for contracts.

(11) A listing of the records and reports that the vendor will maintain to demonstrate the practices and procedures that have been adopted to comply with the requirements and goals of the utilization plan.

(12) Affirmation that the vendor met the statewide minority, women, and disabled veteran business enterprise utilization goals for the previous year, if applicable.

(b) The Department of General Services shall conduct random audits of the submitted utilization plans to determine compliance with this article, and shall retain on file all submitted utilization plans for auditing purposes. During any audit of a submitted utilization plan, the Department of General Services may ask a vendor to submit a list of all the minority, women, and disabled veteran business enterprises included as subcontractors in the vendor's plan for the previous year. This information shall remain confidential. Nothing in this section shall be construed to require the Department of General Services to audit all of the minority, women, and disabled veteran business enterprise utilization plans submitted by individual vendors. The Department of General Services may establish appropriate fees to cover the actual costs of conducting random audits and retaining on file all submitted plans.

(c) (1) At any time, the Department of General Services may disapprove a vendor's minority, women, and disabled veteran business enterprise utilization plan for any of the following reasons:

(A) The utilization plan fails to evidence a vendor's intention to comply fully with the statewide minority, women, and disabled veteran business enterprise goals for the succeeding year, as

indicated by failure of the utilization plan to contain the information specified in subdivision (a).

(B) The utilization plan fails to evidence sufficient business reasons for failure to achieve the minority, women, and disabled veteran business enterprise goals set forth in a utilization plan submitted in the previous year, if applicable.

(C) The utilization plan fails to evidence sufficient remedial steps the vendor will take if the vendor did not meet the minority, women, and disabled veteran business participation goals in the previous year, if applicable.

(2) If a vendor's utilization plan is disapproved, the vendor may not submit a new utilization plan to the department for a period of one year from the date of disapproval. Prior to disapproval of a vendor's utilization plan, the vendor shall be entitled to a public hearing and to five days' notice of the time and place thereof. The notice shall state the reasons for the hearing.

(3) A vendor that submits a minority, women, and disabled veteran business utilization plan that is approved by the Department of General Services, and that is subsequently awarded a contract to which the vendor would not otherwise have been entitled, and who fails to evidence intention to fully comply with the minority, women, and disabled veteran business enterprise goals in the utilization plan, or fails to evidence sufficient business reasons for failing to achieve the minority, women, and disabled veteran business enterprise goals set forth in the utilization plan, shall:

(A) Pay to the state any difference between the contract amount and what the state's cost would have been if the contract had been properly awarded.

(B) In addition to the amount specified in subparagraph (A), be assessed a penalty in an amount of not more than 10 percent of the amount of the contract involved.

(C) Be ineligible to transact any business with the state for a period of not less than three months and not more than 24 months.

Prior to imposition of any sanction under this chapter, the contractor or vendor shall be entitled to a public hearing and to five days' notice of the time and place thereof. The notice shall state the reasons for the hearing.

SEC. 3. Section 10430 of the Public Contract Code is amended to read:

10430. This chapter does not apply to any of the following:

(a) The Regents of the University of California and the Trustees of the California State University, except that Article 9 (commencing with Section 10420) shall apply to the Trustees of the California State University.

(b) (1) Transactions covered under Chapter 3 (commencing with Section 12100), except that Sections 10365.5, 10410, and 10411 shall apply to all transactions under that chapter.

(2) Notwithstanding paragraph (1), Section 10365.5 shall not apply to incidental advice or suggestions made outside of the scope of a consulting services contract.

(3) (A) Notwithstanding paragraph (1), Section 10365.5 shall not apply to a contract that is part of a single competitive procurement conducted in more than one stage for information technology goods or services, when the Director of the Department of General Services and the Chief Information Officer determine that there is no conflict of interest under Section 10365.5 and that it is in the best interest of the state to utilize this procurement method. Nothing in this section shall preclude the applicability of Section 12112 to this procurement method.

(B) The Department of General Services shall annually submit a report on its Internet Web site describing each determination granted pursuant to subparagraph (A), listing the basis for the determination, and disclosing the total amount of money paid or to be paid to the contractor under the contract that was the subject of the determination. The department shall provide notice to the Joint Legislative Budget Committee within 30 days of the posting of the report.

(C) For purposes of this paragraph, “information technology” means information technology goods or services, or both, as appropriate.

(c) Except as otherwise provided in this chapter, any entity exempted from Section 10295. However, the Board of Governors of the California Community Colleges shall be governed by this chapter, except as provided in Sections 10295, 10335, and 10389.

(d) Transactions covered under Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

(e) Except as provided for in subdivision (c), members of boards or commissions who receive no payment other than payment for each meeting of the board or commission, payment for preparatory time, and payment for per diem.

(f) The emergency purchase of protective vests for correctional peace officers whose duties require routine contact with state prison inmates. This subdivision shall remain operative only until January 1, 1987.

(g) Spouses of state officers or employees and individuals and entities that employ spouses of state officers and employees, that are vendored to provide services to regional center clients pursuant to Section 4648 of the Welfare and Institutions Code if the vendor of services, in that capacity, does not receive any material financial benefit, distinguishable from the benefit to the public generally, from any governmental decision made by the state officer or employee.

SEC. 4. Section 10472 of the Public Contract Code is amended to read:

10472. In awarding contracts to the lowest responsible bidder, the awarding department shall consider the responsiveness of a bidder to minority business enterprise and women business enterprise goals set forth in Section 10471.

SEC. 5. Section 12112 of the Public Contract Code, as amended by Section 1 of Chapter 736 of the Statutes of 2007, is amended to read:

12112. (a) Any contract for information technology goods or services, to be manufactured or performed by the contractor especially for the state and not suitable for sale to others in the ordinary course of the contractor's business may provide, on the terms and conditions that the department deems necessary to protect the state's interests, for progress payments for work performed and costs incurred at the contractor's shop or plant, provided that not less than 10 percent of the contract price is required to be withheld until final delivery and acceptance of the goods or services. Notwithstanding this subdivision, if the department determines that lesser withholding levels are appropriate based upon an evaluation of risk determined under subdivision (b) and the contract price is ten million dollars (\$10,000,000) or more, the department shall withhold no less than 5 percent of the contract price until final delivery and acceptance of the goods or services. If the department determines that lesser withholding levels are appropriate based on an evaluation of risk determined under subdivision (b) and the contract price is less than ten million dollars (\$10,000,000), the department shall withhold

no less than 3 percent of the contract price until final delivery and acceptance of the goods or services.

(b) The department, in consultation with the Department of Finance, shall develop and maintain criteria for the evaluation of risk to the state that results from the acquisition of information technology. This risk analysis shall determine the need for financial protection that is in the best interest of the state, including, but not limited to, any of the following:

(1) An acceptable performance bond as described in Chapter 2 (commencing with Section 995.010) of Title 14 of Part 2 of the Code of Civil Procedure.

(2) Any surety as defined in Section 2787 of the Civil Code.

(3) A letter of credit as described in Division 5 (commencing with Section 5101) of the Commercial Code.

(4) Protection in the form of contract terms.

(5) Any other form of security or guaranty of performance in an amount sufficient to protect the state in the case of default by the contractor providing information technology, or any other breach or malfunction of the goods or services, or both.

(c) The department shall, on or before June 1, 2008, submit the criteria developed and maintained pursuant to subdivision (b) to the Joint Legislative Budget Committee and to the State Chief Information Officer.

(d) The State Chief Information Officer shall, on or before July 1, 2012, do both of the following:

(1) Review and report to the Legislature on all contracts approved pursuant to this section on and after January 1, 2008.

(2) Report to the Legislature any recommendations for changes to this section or changes to the criteria developed and maintained by the department pursuant to subdivision (b).

(e) For purposes of this section, “information technology” means information technology goods or services, or both, as appropriate.

(f) This section shall become inoperative on July 1, 2013, and shall be repealed on January 1, 2014.

SEC. 6. (a) Each state agency shall submit a report to the Department of General Services, on or before July 1, 2012, reporting the impact of the amendments made by Sections 1, 2, and 4 of this act upon outreach efforts and upon the actual award of contracts by that agency to bidders meeting the business

enterprise goals set forth in Article 1.5 (commencing with Section 10115) of Part 2 of Division 2 of the Public Contract Code.

(b) The Department of General Services shall submit a report to the Legislature, using the data submitted pursuant subdivision (a), on or before January 1, 2013, reporting the impact of the amendments made by Sections 1, 2, and 4 of this act upon outreach efforts and upon the actual award of contracts by the state to bidders meeting the business enterprise goals set forth in Article 1.5 (commencing with Section 10115) of Part 2 of Division 2 of the Public Contract Code.

SEC. 7. It is the intent of the Legislature in amending Sections 10115.2, 10115.15, and 10472 of the Public Contract Code that contractors be required to meet disabled veterans business enterprise goals, and to dispense with the option that contractors comply with these sections by documenting that they have made a good faith effort to do so. Because these provisions are not currently enforced with respect to minority business enterprises or women business enterprises pursuant to Executive Order No. W-172-98 (March 10, 1998), the amendments to these statutes made by this act are not intended to apply to those business enterprises.

SEC. 8. This act addresses the fiscal emergency declared by the Governor by proclamation on July 1, 2009, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.

SEC. 9. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to reform specified requirements applicable to state contracts as soon as possible, it is necessary that this act take effect immediately.

Approved _____, 2009

Governor